No. 07-1354

In the Supreme Court of the United States

MICHAEL J. BUDD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GRACE CHUNG BECKER
Acting Assistant Attorney General
MARK L. GROSS
GREGORY B. FRIEL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the jury instructions at petitioner's trial constructively amended the indictment in violation of the Grand Jury Clause of the Fifth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 496 F.3d 517.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2007. A petition for rehearing was denied on January 23, 2008 (Pet. App. 49a). The petition for a writ of certiorari was filed on April 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following jury trials in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and three counts of depriving another of constitutional rights under color of law, in violation of

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18 U.S.C. 242. Pet. App. 2a-3a, 40a-41a. The district court sentenced petitioner to 97 months of imprisonment, to be followed by three years of supervised release, and a $12,500 fine. *Id.* at 42a-48a. The court of appeals affirmed. *Id.* at 1a-30a.

1. Petitioner was the second-in-command of the Mahoning County, Ohio, Sheriff's Department, holding the rank of major. In that position, petitioner supervised the County Jail and security at the County Courthouse in Youngstown. Gov't C.A. Br. 5.

The victim of the conduct relevant here, Brandon Moore, was a 16-year-old detainee in the custody of the Sheriff's Department and was at the County Courthouse for his sentencing. Petitioner was in charge of courthouse security that day. After Moore's sentencing (but before he was remanded to custody or a final judgment was entered), he was taken to a conference room in the courthouse by petitioner and several deputies. Moore was restrained with handcuffs, leg shackles, and a belly chain. Gov't C.A. Br. 12-13, 39; C.A. App. 679-680.

Petitioner became upset about comments Moore made about his trial and sentencing. Petitioner slammed Moore's head into a window; pushed Moore against the steel windowframe, leaving an indentation in Moore's forehead; threw Moore to the floor face-first, knocking the breath out of him; stepped on Moore's back with both feet; and kicked Moore in the ribs. During the entire assault, Moore was fully restrained by his handcuffs and chains and offered no resistance or threat. See Gov't C.A. Br. 13-15.

2. A grand jury in the Northern District of Ohio indicted petitioner on several federal charges. Count 3 of the indictment charged petitioner with violating Moore's civil rights under color of law, in violation of

18 U.S.C. 242. Pet. App. 58a. The other counts charged petitioner with violating and conspiring to violate the rights of two pretrial detainees at the County Jail. *Id.* at 53a-57a, 58a-59a.

Count 3 alleged that petitioner, "while acting under color of [state] law[], * * * did use and cause to be used excessive force on Brandon Moore." Pet. App. 58a. That use of force, the indictment charged, had "willfully depriv[ed] [Moore] of rights and privileges secured and protected by the Constitution and laws of the United States, to wit: the right to Due Process of law under the Constitution, which includes the right to be free from excessive force amounting to punishment by one acting under color of law." *Ibid.* Therefore, the indictment alleged, petitioner had violated Section 242 both as a principal and as an aider and abettor. See *ibid.*

At trial, petitioner contended that Moore was no longer a pretrial detainee when he was beaten, and therefore that the charge required proof that petitioner had violated Moore's rights under the Eighth Amendment, not the Due Process Clause. C.A. App. 196-197. Petitioner requested that the jury be instructed accordingly. *Id.* at 206-211. He contended that proving an Eighth Amendment violation required the government to surmount a "substantially higher hurdle" than proving a due process violation. *Id.* at 197. The government contended that because Moore's conviction was not yet final when he was beaten, the due process standard should apply. *Id.* at 686-687. The district court agreed with petitioner that the Eighth Amendment governed the charge of violating Moore's civil rights, and the court submitted Count 3 to the jury on that basis. See *id.* at 683-684, 779.

The jury found petitioner guilty of the conspiracy count, but was unable to reach a verdict on the other charges, including Count 3. The district court declared a mistrial, and petitioner was re-tried on Counts 2, 3, and 4. Pet. App. 3a.

Shortly before the retrial, petitioner moved to dismiss Count 3. He contended that the indictment failed to charge an Eighth Amendment violation and that retrying him on Count 3 under an Eighth Amendment theory would constructively amend the indictment. Gov't C.A. Br. 39. The district court denied the motion. C.A. App. 361-364.

At the retrial, the district court again instructed the jury that Count 3 required the government to prove that petitioner had violated Moore's Eighth Amendment rights, *i.e.*, that he had "unnecessarily and wantonly inflicted pain on Brandon Moore" that was not "applied in a good faith effort to maintain or restore discipline." C.A. App. 1863. The jury found petitioner guilty on all remaining charges, including Count 3. Pet. App. 3a.

3. The court of appeals affirmed. Pet. App. 1a-39a. As relevant here, the court held that the jury instructions on Count 3 did not constructively amend the indictment but resulted at most in a harmless variance. *Id.* at 3a-17a.

a. At the outset, the court explained that a "constructive amendment results when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." Pet. App. 4a (citation omitted). The court identified two situations in which a constructive amend-

ment can occur: (1) where the jury instructions and evidence present a factual theory of the case that differs from the one alleged in the indictment, and (2) where the jury instructions change the legal theory of the case in such a way that the defendant is convicted of a crime distinct from the one alleged in the indictment. *Id.* at 6a-7a, 9a-10a.

The court further explained that some discrepancies between indictment and proof do not rise to the level of constructive amendments, but are instead mere variances and may be harmless. Pet. App. 4a-5a. "Generally speaking," the court explained, "a variance 'occurs when the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment.'" *Id.* at 4a (citations omitted). A variance is not reversible error unless it "affect[s] some substantial right of the defendant." *Id.* at 6a (citation omitted; brackets in original). Petitioner did not attempt to identify any effect on his substantial rights. See *id.* at 17a. Thus, the court of appeals considered only whether petitioner had identified a change significant enough to constitute a constructive amendment.

An alleged change in the government's legal theory (rather than its factual basis), the court of appeals elaborated, is a constructive amendment only if it asks the jury to convict the defendant of an *offense* different from the one charged. The court explained that the defendant must show that "the offense described in the indictment and that described in the jury instructions are two different offenses," and not just "two methods of committing one offense." Pet. App. 9a-10a. Proving the same offense by a different method, by contrast, creates only a variance. See *id.* at 6a-11a. This distinction, in the

court's view, harmonized two lines of circuit precedent extending back to 1981 (although the court acknowledged that some "tension" remained, *id.* at 11a n.4).

Applying these standards, the court of appeals held that the district court did not constructively amend the indictment by instructing the jury that an element of Count 3 was petitioner's violation of the Eighth Amendment. Pet. App. 13a-17a. The court explained that the factual theory of the indictment and the facts proved to the jury were identical. *Id.* at 13a, 16a, 17a. The court further observed that "[t]he indictment and the jury instructions * * * specify an offense against the same statute, 18 U.S.C. § 242." *Id.* at 13a. The court concluded that "the Fourteenth Amendment language in the indictment and the Eighth Amendment language in the jury instructions describe two different methods of committing the same crime, and the difference [was] merely a variance." *Id.* at 16a-17a; see *id.* at 13a-14a.

Petitioner made no effort to show prejudice from the variance, and the court discerned none, because "[petitioner]'s ability to present a defense * * * could not reasonably have been undermined by the change" in theories. Pet. App. 17a. The court also noted that "there is no suggestion that [petitioner] could be subjected to double jeopardy" as a result of the variance. *Ibid.* The court therefore affirmed the conviction. *Id.* at 30a.

b. Judge Cook dissented in relevant part, concluding that the jury instructions resulted in a constructive amendment requiring reversal of petitioner's conviction on Count 3. Pet. App. 30a-39a. In her view, whenever "the jury instructions do not mirror the indictment," there has been a constructive amendment that is "per se prejudicial." *Id.* at 34a-35a. Judge Cook also disagreed

with the majority's conclusion that the due process violation alleged in the indictment and the Eighth Amendment standard contained in the jury instructions were merely "alternative method[s]" by which petitioner could violate 18 U.S.C. 242. Pet. App. 36a. She argued that if Moore was a convicted inmate, rather than a pretrial detainee, he did not have the Fourteenth Amendment right identified in Count 3 of the indictment, and that the indictment therefore did not allege an alternative "method" of violating Section 242. *Id.* at 36a-37a.

ARGUMENT

Petitioner alleges no conflict among the courts of appeals, but contends that the decision below is contrary to this Court's precedents. That contention is incorrect. The court of appeals correctly applied this Court's cases in concluding that no constructive amendment occurred in this case. Indeed, the purported discrepancy between the indictment and the jury instructions in this case is so minimal that it does not qualify as a variance, and it clearly caused no prejudice to petitioner. Further review therefore is not warranted.

1. The Grand Jury Clause of the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. This right protects a defendant from being "tried on charges that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960). Consequently, "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Id.* at 215-216. As the court of appeals recognized (Pet. App. 4a), such an impermissible amendment may occur where

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the jury instructions and evidence at trial broaden the core factual theory alleged in the indictment. See *Stirone*, 361 U.S. at 217-219.

2. No constructive amendment occurred in this case. The jury instructions did not broaden either the factual or legal theory of guilt charged in Count 3; indeed, because the facts and identity of petitioner's crime were proved just as they were alleged in the indictment, any discrepancy in identifying precisely which constitutional right petitioner violated was altogether irrelevant. The jury instructions therefore did not violate petitioner's rights under the Grand Jury Clause.

a. The court of appeals correctly concluded that the jury instructions did not alter the factual theory alleged in Count 3. Pet. App. 16a-17a. The factual predicate charged in the indictment was that petitioner "did use and cause to be used excessive force on Brandon Moore, * * * resulting in bodily injury," and that he did so willfully and with an intent to deprive Moore of his constitutional rights. *Id.* at 58a. The same facts were presented at trial and served as the basis of the jury's finding petitioner guilty on Count 3. *Id.* at 16a.

That identity of proof is alone sufficient to distinguish this case from the decisions on which petitioner relies. In *Stirone*, petitioner's principal case, the indictment charged the defendant with using extortion to obstruct the importation of sand, but the proof at trial and the jury instructions permitted a conviction if the defendant had interfered with *either* the importation of sand *or* the exportation of steel (which the indictment had not mentioned). 361 U.S. at 213-214. This Court reversed the conviction, concluding that the "variation between pleading and proof" so broadened the factual allegations that it allowed the defendant to be convicted of an of-

fense that the grand jury had never charged. *Id.* at 217-219. *Stirone* has no application to a case like petitioner's, in which the jury instructions and evidence at trial left the factual allegations of his indictment entirely unchanged.[1]

b. Petitioner nonetheless contends that the jury instructions and proof at trial varied from the indictment's legal theory for alleging (Pet. App. 58a) that his "us[ing] * * * excessive force on Brandon Moore" violated Moore's constitutional rights. That contention lacks merit, for several reasons.

First, and most simply, there was no variance at all, because a state actor's infringement of Eighth Amendment rights is necessarily a deprivation of due process as well. "[T]he Due Process Clause of the Fourteenth Amendment incorporates the Eighth Amendment's guarantee against cruel and unusual punishment." *United States* v. *Georgia*, 546 U.S. 151, 157 (2006). Thus, as two other circuits have correctly held, no constructive amendment occurs in an excessive-force case

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[1] Petitioner cites a handful of cases in addition to *Stirone*, but none of them is contrary to the decision below. In *Ex parte Bain*, 121 U.S. 1 (1887), not only was the amendment a factual one (concerning the identity of the government official whom Bain had intended to deceive), it was also an express one: the trial court actually amended the indictment. *Id.* at 4-5. In any event, *Bain* is no longer good law; the amendment in question merely struck allegations from the indictment, *id.* at 5, and this Court has since made clear that the grand-jury right—to be tried based only on allegations made by the grand jury—is not violated when some of the grand jury's allegations are stricken. *United States* v. *Miller*, 471 U.S. 130, 144-145 (1985). And in *Russell* v. *United States*, 369 U.S. 749 (1962), the indictment failed altogether to specify a factual matter that this Court deemed essential to any allegation of the offense of contempt of Congress. See *id.* at 752-755; *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 109-110 (2007).

under 18 U.S.C. 242 where, as here, the indictment alleges a "due process" violation, but the jury instructions invoke a different provision of the Bill of Rights applicable to state actors through the Due Process Clause. See *United States* v. *Johnstone*, 107 F.3d 200, 207 n.6 (3d Cir. 1997); *United States* v. *Reese*, 2 F.3d 870, 890-891 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994).

Second, even if the Eighth Amendment applied to state actors like petitioner of its own force rather than through the Fourteenth Amendment, the factual allegations of the indictment were adequate to charge an Eighth Amendment violation. In particular, Count 3's allegation of "excessive force amounting to punishment" (Pet. App. 58a) is factually consistent with the jury's finding of an Eighth Amendment violation. It is well settled that excessive force against an inmate can constitute cruel and unusual punishment violating the Eighth Amendment. See *Hudson* v. *McMillian*, 503 U.S. 1, 7 (1992) (holding that "excessive physical force" violates the Eighth Amendment when it is applied "maliciously and sadistically to cause harm," rather than "in a good-faith effort to maintain or restore discipline"). Petitioner, echoing the dissenting judge in the court of appeals, contends (Pet. 9) that the element of "mental state" was missing from the indictment. Count 3, however, charged petitioner with "*willfully* depriving [Moore] of rights and privileges secured and protected by the Constitution and laws of the United States." Pet. App. 58a (emphasis added). Whether described as a Due Process Clause or Eighth Amendment violation, the government's essential allegation remained the same—*i.e.*, that petitioner had *deliberately* used excessive force for the illegitimate purpose of inflicting pain, rather than using force (whether actually excessive or not) for the

legitimate purpose of maintaining or restoring order in the conference room. Cf. *Hope* v. *Pelzer*, 536 U.S. 730, 736 (2002) (use of hitching post violated Eighth Amendment in part because its "purpose * * * was punitive" rather than legitimately disciplinary). The indictment therefore was factually adequate to support the Eighth Amendment charge that went to the jury, and that fact-bound issue does not warrant further review.

Third, nothing in this Court's cases suggests that a change in the *legal theory* on which an indictment rests can be a constructive amendment justifying reversal. Where both the indictment and the jury instructions correctly charge the elements necessary to prove that the defendant willfully deprived the victim of a particular constitutional right under color of law, the indictment need not specify the clause of the Constitution that confers the right. Cf. *Screws* v. *United States*, 325 U.S. 91, 106 (1945) (plurality opinion) ("The fact that the defendants may not have been thinking in constitutional terms is not material * * * [in such a prosecution]."); *United States* v. *Miller*, 471 U.S. 130, 136-137 (1985) (explaining that "[a] part of the indictment unnecessary to and independent of the allegations of the offense," such as "allegations that * * * would have had no legal relevance if proved," is properly "treated as 'a useless averment' that 'may be ignored'") (quoting *Ford* v. *United States*, 273 U.S. 593, 602 (1927)). For that reason, if an indictment misidentifies the constitutional provision at issue in a Section 242 prosecution but correctly states the facts and the elements, the district court can submit the case to the jury and disregard the indictment's substantively irrelevant citation error. In those circumstances no constructive amendment occurs. See, *e.g.*, *United States* v. *Daniels*, 281 F.3d 168, 178-180 (5th

Cir.) (concluding that, where the facts showing excessive force remained unchanged between indictment and trial, whether the indictment cited the Eighth or the Fourteenth Amendment was irrelevant), cert. denied, 535 U.S. 1105 (2002).

Fourth, reversal based on a claim of a constructive amendment would be particularly unwarranted in a case like this one, because any change in legal theories made no substantive difference at all. If, as petitioner insisted, Moore was a convicted inmate in state custody, then the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment provided Moore substantively identical protections against excessive force. As this Court has explained, "[i]t would indeed be surprising if, in the context of forceful prison security measures, conduct that 'shocks the conscience' or 'afford[s] brutality the cloak of law,' and so violates the Fourteenth Amendment, were not also punishment 'inconsistent with contemporary standards of decency' and '"repugnant to the conscience of mankind,"' in violation of the Eighth." *Whitley* v. *Albers*, 475 U.S. 312, 327 (1986) (citations omitted; second brackets in original). Citing *Whitley*, several courts of appeals have recognized that the standards for assessing convicted prisoners' excessive-force claims are identical under the Eighth and Fourteenth Amendments. See *Cockrell* v. *Sparks*, 510 F.3d 1307, 1311 (11th Cir. 2007); *Lunsford* v. *Bennett*, 17 F.3d 1574, 1583 (7th Cir. 1994); *Berry* v. *City of Muskogee*, 900 F.2d 1489, 1493-1494 & n.6 (10th Cir. 1990); *Pressly* v. *Hutto*, 816 F.2d 977, 979 (4th Cir. 1987); see also *Doe* v. *Sullivan County*, 956 F.2d 545, 557 (6th Cir.) (noting the "overlap" between "inmate claims arising under both the Eighth Amendment and the substantive branch of the Due Process Clause" and

explaining that "both clauses address the substantive protections enjoyed by incarcerated individuals against the 'wanton infliction of pain in penal institutions'") (citation omitted), cert. denied, 506 U.S. 864 (1992). It is because of that substantive overlap that this Court has held that all claims of excessive force involving convicted inmates should be analyzed under an Eighth Amendment standard. *Whitley*, 475 U.S. at 327; see *Hudson*, 503 U.S. at 5-7; *Graham* v. *Connor*, 490 U.S. 386, 395 n.10 (1989) ("Any protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment.").

Petitioner insists that the indictment's reference to the Fourteenth Amendment specifically invokes not the due process standard that protects convicted inmates, but the due process standard that protects *pretrial* detainees. Therefore, he contends, the change to an Eighth Amendment theory *did* have a substantive effect—because, as petitioner has insisted throughout this case, proving a violation of an inmate's Eighth Amendment rights is harder than proving a violation of a pretrial detainee's due process rights. See p. 3, *supra*; see also Pet. App. 39a. But petitioner's characterization of the indictment is factually incorrect: the indictment did not characterize Moore as a "pretrial" detainee, and its allegations of the willful use of excessive force amounting to punishment are sufficient to establish a violation of Moore's rights whether or not he was considered a convicted felon subject to the Eighth Amendment.[2] In

[2] Although the indictment referred to Moore as a "detainee," Pet. App. 58a, that term can accurately describe Moore's status as a prisoner who had been convicted and sentenced but not yet remanded for incarceration. At the time of the indictment, the government took

any event, as discussed above, there would have been no constructive amendment even if the indictment had been indisputably limited to the due process rights that a pretrial detainee enjoys, because a mere change in legal theories is not a constructive amendment. See pp. 11-12, *supra*.

Under these circumstances, petitioner has not shown that the court of appeals misapplied any precedent of this Court. The substance of the constitutional violations alleged in the indictment and those presented to the jury was equivalent; the factual basis of the charge and the elements of the offense remained constant. There was, at most, an inconsistency in labeling or in the precise legal theory invoked. This Court has never held that this sort of discrepancy could constitute a constructive amendment of an indictment.

3. Petitioner effectively conceded below that he was not prejudiced by any constructive amendment, see Pet. App. 17a, but relied on circuit precedent holding that constructive amendments are prejudicial per se, *id.* at 4a. There is a substantial question whether that proposition remains valid in light of this Court's decisions holding that most constitutional errors are subject to harmless-error review. And in this case the harmlessness of any error is apparent.

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the position that this status made Moore akin to a pretrial detainee whose sole constitutional protection against excessive force was the Due Process Clause; petitioner later adopted the position, and the district court agreed, that Moore was instead akin to a convicted felon and that the applicable constitutional protection came from the Eighth Amendment. See p. 3, *supra*. As the courts below concluded, however, the allegations in the indictment do not depend on Moore's being a pretrial detainee and are sufficient to charge a violation of his rights as a prisoner.

To the extent that the lower courts have held that a "constructive amendment" always constitutes reversible error, they have relied principally on this Court's decision in *Stirone*. But *Stirone* was decided before this Court held in *Chapman* v. *California*, 386 U.S. 18 (1967), that harmless-error analysis generally applies to constitutional errors. *Id.* at 22. And although this Court has identified certain "structural" errors that are exceptions to that principle, it has never listed constructive amendments to an indictment among them. *E.g.*, *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006); *Neder* v. *United States*, 527 U.S. 1, 8 (1999); *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997). To the contrary, this Court has repeatedly held that defects in grand-jury proceedings are susceptible to the usual harmless-error analysis. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255-256 (1988); *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986); see also *United States* v. *Cotton*, 535 U.S. 625, 629-631 (2002) (holding that defects in an indictment are not jurisdictional and may be forfeited if they do not meet the plain-error test). Indeed, this Court recently granted certiorari to decide whether the outright *omission* of an element from an indictment may be harmless error, but did not resolve the question. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 103-104 (2007). Thus, there is a strong argument that even the error found reversible in *Stirone* would be subject to harmless-error analysis today. Petitioner's claim of error is far afield from Stirone's, as discussed above, and his claim that the error is structural would accordingly be far weaker.

Petitioner could not prevail under any form of harmless-error review. As the court of appeals correctly recognized, the difference between the jury instructions

and the language of Count 3 did not prejudice petitioner's defense. Pet. App. 17a. The government's factual theory remained the same throughout the case, and petitioner had notice in advance of trial (and retrial) that he had to defend himself against an alleged Eighth Amendment violation. And, as petitioner himself emphasized in the district court, any substantive difference between an Eighth Amendment standard and the allegations of Count 3 could work only to petitioner's advantage because the government bore a higher burden at trial.

Moreover, this is not a case in which the prosecution switched legal theories to gain a tactical advantage. To the contrary, it was *petitioner* who initially requested the Eighth Amendment instruction and convinced the district court that the Eighth Amendment standard applied. Judgment had not yet been entered on Moore's conviction, and his status as a convicted felon (protected by the Eighth Amendment) rather than a pretrial detainee (protected by the Fourteenth Amendment) was therefore unclear. The district court resolved that issue—as petitioner requested—by putting the government to the higher burden of proving an Eighth Amendment violation. That ruling by the district court is not free from doubt, but because the government proceeded to meet that higher burden, any error was demonstrably harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GRACE CHUNG BECKER
Acting Assistant Attorney General
MARK L. GROSS
GREGORY B. FRIEL
Attorneys

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